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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1115

LEE PRICE, Individually, and d/b/a PRICES LIVESTOCK MARKETING COMPANY,
Petitioner,

vs.

JAMES D. HODGSON, Secretary of Labor, U. S. Department of Labor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

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vs.

JAMES D. HODGSON, Secretary of Labor, U. S. Department of Labor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

Lee Price, individually, and d/b/a Prices Livestock Marketing Company, petitioner, prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on October 19, 1973.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It reversed a judgment in favor of this petitioner and against the respondent, finding that Eddie Dodson, a former employee of

the petitioner, had "received full compensation in accordance with the provisions of the Fair Labor Standards Act, including the minimum wage then prevailing and also including the overtime rate as prescribed by Section 7 of the Act.

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 19, 1973. No petition for rehearing was filed. Jurisdiction of this court is invoked under 28 USC Section 1254(1).

QUESTION PRESENTED

Did the court below err in reversing the District Court's judgment in favor of the petitioner in holding that 29 USC § 207 does not permit an informal oral understanding as to payments for overtime, wages, to-wit: a guarantee of payment for 55 hours labor, 40 of which are computed at the federal minimum wage then prevailing, and 15 of which are computed at the required time and one-half, when the District Court concluded that the evidence failed to establish that the employee worked in excess of 55 hours per week and "that he may have worked considerably less hours and received a full week's pay based on the 55 hour arrangement . . ."?

STATUTES INVOLVED

The Statute involved is the Fair Labor Standards Act, 29 USC 201 et seq. The relevant provisions are 29 USC 206(a), 207 (a)(1), 207(f) and 216(c). Because these provisions are lengthy, their pertinent text is set forth as Appendix C, p. A-12.

STATEMENT OF THE CASE

This action was brought by the Secretary of Labor under 29 USC 216(c), Fair Labor Standards Act, pursuant to the written request of Eddie Dodson, a laborer, formerly employed by the petitioner. The complaint sought to recover unpaid overtime compensation alleged to be due under 29 USC 207.

The petitioner is engaged in the livestock auction business in Marion County, Illinois where he buys, sells and ships cattle in interstate commerce, and has an annual gross volume in excess of $500,000.

From March 16 through December 6, 1969, Dodson was employed by the petitioner as a laborer in the petitioner's business. Dodson had originally been hired at $85.00 per week but before he started the rate was changed by an informal understanding between the parties to $100.00 per week, which amount represented 40 hours at the applicable minimum wage and 15 hours at the required time and one-half rate. The express purpose of this arrangement was to stay within the minimum wage guidelines.

Testimony was offered, and accepted by the District Court that Dodson never worked more than 55 hours in any week, and may have worked considerably less than 55 hours in any week.

The Circuit Court of Appeals for the Seventh Circuit reversed the District Court and calculated the amount due to be $446.32, based upon 32 weeks of 55 hours (the "regular rate" being $1.818 per hour) and one 50-hour week (the "regular rate" being $2.00 per hour). Senior Judge Knoch dissented, stating in part "we are unduly penalizing this employer not only for failing to retain legal counsel to draft an employment contract for him in such specific terms as beyond question would not meet the technical requirements of the law, but also for his generosity in dealing loosely and informally with the payments for overtime." (App. B p. A-11).

REASONS FOR GRANTING THE WRIT

The Fair Labor Standards Act (29 USC 207 et seq.) Permits an Informal Employment Contract With a Guaranteed Weekly Wage, Based Upon Forty Hours at the Prevailing Minimum Hourly Rate and 15 Hours at One and One Half Times Said Rate, Though the Employee Does Not Work Hours in Excess of the Guaranteed Period.

A. The Fair Labor Standards Act Does Not Prescribe a Rigorous and Inflexible Form for Weekly Wage Guarantee Contracts.

The basic rule that an employer can by a weekly wage guarantee comply with the overtime provisions of the Fair Labor Standards Act is beyond dispute. **Walling v. A. H. Belo Corp.,** 316 US 624, 62 S.Ct. 1223, 86 L. Ed. 1716 (1942), **Walling v. Haliburton Oil Well Cementing Co.,** 152 F. 2d 622 (9th Cir., 1945) Aff. 331 U.S. 17, 91 L. Ed. 1312, 67 S. Ct. 106 (1946), **Mitchell v. Hartford Steam Boiler Inspection & Insurance Co.,** 235 F. 2d 942 (2nd Cir. 1956), **Tobin v. Little Rock Packing Co., et al.** and **U. S. v. Little Rock Packing Co., et al.,** 202 F. 2d 234 (8th Cir. 1953), **Mitchell v. Brandtgen and Cluge, Inc.,** 228 F. 2d 291 (1st Cir. 1955) Cert. Den. 352 U.S. 940, 1 L. Ed. 2d 236, 77 S. Ct. 260, **McComb v. Utica Knitting Co.,** 164 F. 2d 670 (2d Cir. 1947), **Triple "AAA" Company, Inc., et al. v. Wirtz,** 378 F. 2d 884 (10th Cir. 1967), **Walling v. Frank Adam Electric Co.,** 163 F. 2d 277 (8th Cir. 1947), **Castle v. Walling,** 153 F.2d 923 (5th Cir. 1946), **149 Madison Avenue Corporation v. Frank Asselta,** 331 U.S. 199, 91 L.Ed. 1432, 67 S. Ct. 1178 (1946), **Nunn's Battery & Electric Company v. Goldberg,** 298 F.2d 516 (5th Cir. 1962), **Seneca Coal & Coke Co. v. Lofton,** 136 F. 2d 359 (10th Cir. 1943), **Mitchell v. Adams,** 230 F. 2d 527 (5th Cir. 1956).

The question sought to be reviewed on this petition, however, is whether that wage guarantee must be in some inflexible form, or whether the Fair Labor Standards Act permits an informal employment contract. It is submitted that the statement in Mitchell v. Hartford, 235 F. 2d 944, "the decisions of lower Federal Courts illustrate the unsettled state of the law" is a fair summary of the problem confronting this court.

The Seventh Circuit in the case below held that the facts did not constitute a contract sufficient for the purposes of 29 USC § 207(a)(1). The District Court, however, having had the opportunity to view all of the evidence and the witnesses during trial, concluded that there was an acceptable contract. The learned trial judge based his findings upon the testimony of Lee Price, Mrs. Lee Price, Emil Quand, an employee of Lee Price, and Douglas R. Back, another employee of Price. The trial court found: "the evidence was very conflicting with regard to actual agreements entered into between Dodson and the defendant in that Dodson claimed there never was any mention of the minimum wage arrangements with him. He was, however, unable to explain the reason for his beginning work at $100.00 per week, rather than at the $85.00 figure originally agreed upon. The court finds it is more reasonable to believe that when this increase of $15.00 per week was added to a previously agreed salary, the testimony of the defendant [Lee Price] is more probably correct than that of the employee, Dodson, since on the one hand, a complete and full explanation is given and on the other hand the increase in salary stands unexplained by Dodson." (Appendix "A, Pg. A-2–A-3").

The Fifth Circuit in Nunn's Battery and Electric Co. v. Goldberg, 298 F. 2d 516 (5th Cir. 1962) based its findings upon the fact that when the employees were hired, there was no mention of an hourly rate, affirmed the trial court's determination that the conversation between the employer and employee was insufficient to constitute an oral agreement that satisfied the Fair

Labor Standards Act. That court, however, stated at page 519: "the operative mechanism of the statute is the differential between the regular rate of pay and the overtime rate, since that is what compensates the employee for their having to work extra hours and that is what penalizes the employer for calling upon them to do so." In the case at bar, the trial court determined that in fact the conversation did constitute an acceptable contract. The Seventh Circuit however, overruling the trial court's finding of fact, declares as a matter of law, that the conversation did not constitute an acceptable contract.

In the Court of Appeals below, the Department of Labor relied heavily upon the case of Walling v. Stone, 131 F. 2d 461 (7th Cir. 1942). That court condemns the practice of transforming a general intention by implication into a specific intention that overtime be paid for at time and a half the regular rate. 131 F. 2d 463. However, in interpreting the United States Supreme Court's holding in Overnight Motor Transportation Co. v. Missel, 316 U. S. 572, 86 L.Ed. 1683, 62 S. Ct. 1216 (1942) at pg. 463: "that the contract did not comply with requirements of § 7 of the Act, and pointed out that two elements are essential in a contract of employment in order to comply with the Act: (1) either a stated hourly rate for regular work, or an upper limit on the total number of hours to be worked for a fixed salary, and (2) an express provision that overtime should be paid for at time and one-half the regular rate."

In the case at bar, the testimony, as the trial court concluded, can be fairly interpreted to find a stated hourly rate for regular work, and an upper limit on the total number of hours to be worked for that sum, and a provision that the overtime be paid for at time and one-half the regular rate. While these understandings may not have been reduced to a formal writing, it cannot be ignored that the ultimate intent of Lee Price was to give his employees, including Eddie Dodson, the benefit of

the doubt, and pay them according to what he expected from them at a maximum, whether or not they in fact worked that maximum. To hold that such a practice violates § 7 of the Fair Labor Standards Act might effectively deprive thousands of employees similarly situated throughout the United States from this extra compensation for work not performed.

In Tobin v. Little Rock Packing Co., 202 F.2d at 238, the court states:

> "the question of the validity of guaranteed wage plans depends upon **the particular facts in each case.** All of them, regardless of the result of the particular facts involved stand for the rule that the Fair Labor Standards Act imposes **no inflexible form of contract** on employer and employee. The test implied in each case is whether the wage rates specified in the contract of employment is fictitious or whether the stipulated rate is in fact, the actual rate paid for the normal non-overtime work week. Contracts of employment in which the stipulated hourly rate bears no relation to the compensation guaranteed by the contract are violative of the Act. Contracts in which, as in the present case, the guaranteed compensation is actually predicated upon and computed by the stipulated wage rates meet all requirements of the Act." (Emphasis added.)

The acceptability of informal contracts was also upheld in Mitchell v. Adams, 230 F. 2d 527 (5th Cir. 1956); Mitchell v. Brandtgen & Cluge, Inc., 228 F. 2d 291 (1st Cir. 1955), Cert. Den., 352 U.S. 940, 1 L.Ed. 2d 236, 77 S. Ct. 260, and Tobin v. Keystone Manufacturing Co., 143 F. Supp. 232 (1952).

To hold that an employer cannot pay his employees more money than that to which they might be entitled will serve only to defeat the very purposes for which the Fair Labor Standards Act was intended.

The 7th Circuit below substitutes its findings of fact for that of the trial court and concludes that a contract never in fact existed. The Court first finds that the contract made no prosision for hours worked in excess of 55. The trial court, however, concluded from all of the testimony that in fact no work had been accomplished in excess of 55 hours. The second finding was that when there was a reduction in pay, it was by increments of one-sixth which the Seventh Circuit concluded indicated a reduction on a daily rather than an hourly rate. The testimony was clear, and obviously convinced the trial court, that when there was a reduction in pay, it was not until after the second day in a given week, and not after the first day (Appendix "D", pg. A-15). The Department of Labor would suggest that when a day was missed, the employee should have his wages reduced by whatever hours he missed at the overtime rate. Your petitioner's method, not only gave the employee the benefit of the doubt on his first day of absence, but in fact reduced the employee's at a rate less than the over-time rate for the two day absence.

It is submitted that this Court should grant a Writ of Certiorari to settle the questions presented in an informal employment contract, and to resolve the dispute now existing between the Circuit Courts of Appeal.

B. The Failure to Maintain Pay Records in and of Itself Does Not Constitute a Basis for Recovery of Overtime Under 29 USC § 216(c) Absent Proof of Unpaid Overtime Hours.

The Seventh Circuit below points an accusing finger at the petitioner for failing to maintain proper records, citing Hodgson v. Elm Hill Meats, 327 F. Supp. 1009, 1014 (E.D. Ky., 1971), Aff'd 463 F. 2d 1186 (6th Cir. 1972). In Mitchell v. Feinberg, 236 F. 2d 9 (2nd Cir. 1956), in an action by the Department to enjoin the employer from violating the Fair Labor Standards Act, the court held that even though there is a violation

of the record keeping provisions of the Act, a contract can meet that Act's requirements.

In Wirtz v. Williams, 369 F. 2d 783 (5th Cir. 1956), no records were maintained and the court concluded that there was "substantial evidence to support a finding of a violation of the Act's wage and overtime compensation provisions" (369 F. 2d 785). In the case at bar, the trial court reached exactly the opposite conclusion, in determining that there was in fact no violation of the overtime provisions even though no records were maintained.

The Department of Labor, in the absence of records, challenges the activities of the petitioner as "ingenius, mathematical manipulations". It is submitted that the Senior Circuit Judge in his dissent below properly assessed the situation by holding see (Appendix B, pg. A-11) that: "It is entirely probable that, apart from improving employee relations by, in effect, guaranteed overtime, the attendant bookkeeping costs of recording each hour and computing pay on that basis were unjustified from a business viewpoint."

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted

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APPENDIX A

Opinion of United States District Court
Memorandum and Order

This action is brought by plaintiff James D. Hodgson, Secretary of Labor, United States Department of Labor, to recover from the defendant Lee Price, individually and doing business as Price's Livestock Marketing Company, unpaid overtime compensation allegedly due to defendant's employee, Eddie Dodson, under the provisions of the Fair Labor Standards Act, 29 U.S.C. 201 et seq. Jurisdiction is founded on section 16(c) of the Act and Title 28 U.S.C.A. 1337 and 1345.

According to the stipulation, the defendant is engaged in activities in the course of his business in an enterprise within the meaning of section 3(r) of the Act; the defendant resides within the jurisdiction of this Court and delivers in interstate commerce substantial quantities of cattle, which are shipped, sold and delivered from Illinois to points located outside the State of Illinois; the defendant constitutes an enterprise engaged in commerce or in the production of goods for commerce within the meaning of section 3(s)(1) of the Act; Eddie Dodson, an employee of the defendant, filed a written request with the plaintiff to bring this action, claiming unpaid overtime compensation from the defendant; Eddie Dodson was employed by the defendant in each workweek during the period from March 16, 1969, through December 6, 1969.

The only issues for decision by the Court are (1) the number of hours worked by Eddie Dodson for defendant in excess of 40 in a workweek, if any, and (2) determination of the amount of unpaid overtime compensation due Eddie Dodson for these hours found by the Court to have been worked by him in excess of 40 in a workweek.

The evidence disclosed that sometime prior to March 16, 1969, the defendant Lee Price contacted Eddie Dodson and offered him employment at his livestock marketing company located in Marion County, Illinois. At the time the original contact was made the defendant offered Dodson a salary of $85 per week. It was agreed that this salary was acceptable to both parties, and Dodson was informed to report on the 16th of March, 1969. Following hiring Dodson, the defendant Price in consulting with his wife, Ramona Price, determined that the $85 figure would not meet the requirements of the minimum wage law and that, therefore, they would be required to pay a greater amount. They determined that approximately 50 to 55 hours per week would be required in order for Dodson to perform the duties for which he was being hired. Based on the 55-hour per week schedule, it would be necessary to pay him $100 per week to meet the minimum wage requirements. This figure was arrived at by taking the minimum wage of $1.60 per hour, multiplying by 40 to meet the standard 40-hour week requirement and the balance of the 55 hours, namely, 15 hours at the time and ½ requirement or at the sum of $2.40 per hour. By computing these sums necessary to meet the requirements, it was determined that the $100 a week base salary would be required. When Dodson commenced work, he was paid the $100 per week rather than the original $85 per week that had been agreed to at the time of employment.

The evidence was very conflicting with regard to actual agreements entered into between Dodson and the defendant in that Dodson claimed there was never any mention of the minimum wage arrangements with him. He was, however, unable to explain the reason for his beginning work at $100 per week, rather than at the $85 figure originally agreed upon. The Court finds it is more reasonable to believe that, when this increase of $15 per week was added to a previously agreed salary, the testimony of the defendant is more probably correct than that of the employee Dodson, since on the one hand a complete and

full explanation is given and on the other hand the increase in salary stands unexplained by Dodson.

The employee Dodson testified that he worked between 60 and 70 hours per week; that he was to commence work at 7:00 a.m. in the morning and work until 6:00 p.m. in the evening, with one hour off for lunch, for five days each week, that is, Monday through Saturday, with the exception of Thursday, which was sale day at the livestock market. On Thursday it was necessary that he work until his work had been completed, which, according to his testimony, sometimes was as late as midnight.

The testimony of the defendant Lee Price and his supervising employee, Douglas R. Back, is in direct conflict with the testimony of the employee Dodson. According to both of these witnesses, the starting time for the employee Dodson was 8:00 a.m., except on Thursday when the starting time was 7:30 a.m.; the quitting time on Monday, Tuesday and Friday was 5:00 p.m.; on Wednesday it was sometimes necessary to work until 6:00 p.m.; and on Thursday the sale was ordinarily completed by 9:00 to 9:30 p.m. The defendant Price further testified that the employee Dodson was only required to work until noon on Saturday, but on occasion it was necessary for him to work the entire day on Saturday. The standard procedure was that he work only Saturday morning.

One Emiel Quand testified that he was a trucker and did considerable hauling for defendant Price; that in the course of this hauling he had occasion to be in the sale barn where the livestock marketing company carried on its business and that in these instances he seldom, if ever, saw the employee Dodson at the premises prior to 8:00 o'clock in the morning and rarely saw him there past 5:00 p.m. in the evening with the exception of Thursday, the sale day; that he was frequently at the bar around 8:00 a.m. and 5:00 p.m.

The positive testimony of the defendant Price was that the hours worked by Eddie Dodson were from 50 to 55 hours per week; that Dodson never worked more than 55 hours in any given week.

A co-employee of the employee Dodson, Robert L. Hays, testified that he worked with Dodson and that he worked 60 to 70 hours per week; however, pay records for three weeks during which this witness worked showed that he never at any of the time shown on the records worked nearly so many hours as claimed, in fact, none of the pay records show that he worked even as many as 50 hours in any of the weeks for which he could supply pay records. The Court finds that the testimony of this witness does not support the claimed 60 to 70 hours of employment per week.

The deposition of Marie Roegler, a former bookkeeper for the defendant, was introduced in evidence to substantiate the number of hours worked by the employee. The Court has examined this deposition and finds that the contract between the bookkeeper and the employee was such that the bookkeeper apparently had very little contact with the employee and was not in a position to testify accurately concerning the hours worked. From memory she testified that she had checked the number of hours worked on some occasions; there were no records to substantiate this in any fashion. She further testified that the employee in question was at work when she arrived at 8:00 and was still there when she left at 5:00 and that he took only ½ hour for lunch; whereas, the actual situation is, and all of the testimony was to the effect, that an hour's lunch period was taken each day. Additionally, this employee did not work on Saturday except on rare occasion and generally was not at the office on Friday. The contact this witness had with the employee was insufficient basis upon which to base any reliable conclusion concerning hours worked.

Harold Steen, compliance officer for the United States Department of Labor, Wage and Hour Division, testified that he had consulted with the defendant Price concerning the hours worked by various employees and specifically Eddie Dodson; that the Defendant Price had stated to him that he paid Eddie $100 per week guaranteed salary, but that at no time was he informed that the breakdown of the salary was that intended to be the breakdown testified to by the defendant Price, namely, there was no mention of the regular 40 hours at the minimum wage and the balance of the 15 hours at the time and ½ requirement. Defendant Price's testimony was to the contrary.

Mary Dodson, wife of the employee Eddie Dodson, testified that she took her husband to work daily at 7:00 o'clock and that she picked him up at 6:00 o'clock in the evening generally; that she needed the car at home for use with the children; that she always took her husband to work and then returned home from taking him and arrived prior to the time the children departed for school. The fact that this employee went to work, if such is the case, at 7:00 o'clock in the morning is not controlling if in fact his hours of employment did not start, according to his employer and the supervising employee, until 8:00 a.m. as they so testified.

The Court finds that the evidence failed to establish that the employee Dodson worked in excess of 55 hours per week. The evidence did establish that the salary paid Dodson was based on the minimum wage for 40 hours per week and time and ½ for 15 hours per week.

Much has been said about the fact that when the employee Dodson missed work, his salary was reduced by an amount equal to 1/6th of his total wage, rather than a deduction of the overtime rate; and the fact that the employee Dodson did not work an exact number of 55 hours per week is not controlling;

and that he may have worked considerably less hours and received a fully week's pay based on the 55-hour arrangement is likewise not controlling. As was testified by the defendant Price, there was an agreement made with the employee for $100 a week minimum whether he worked the 55 hours or not.

The Court finds that the employee Eddie Dodson received full compensation in accordance with the provisions of the Fair Labor Standards Act, including the minimum wage then prevailing and also including the overtime rate as prescribed by section 7 of the Act.

It Is, Therefore, the Order of this Court that judgment be and the same is hereby entered in favor of the defendant, Lee Price, Individually and Doing Business as Price's Livestock Marketing Company, and against the plaintiff James D. Hodgson, Secretary of Labor, United States Department of Labor.

/s/ William G. Juergens
Chief Judge

[Entered, October 14, 1971]

APPENDIX B

Opinion of United States Court of Appeals

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

(Argued October 16, 1972)

October 19, 1973

Before

Hon. Luther M. Swygert, Chief Judge
Hon. Win G. Knoch, Senior Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge

No. 71-1917

James D. Hodgson, Sec'y of Labor, U.S. Dept. of Labor,

vs.

Lee Price, individually, and dba Price's Livestock Marketing Company, Appellee.

Appeal from the United States District Court for the Eastern District of Illinois.

William G. Juergens, Judge

Civil 70-73

ORDER

The Secretary of Labor brought this action under 29 U.S.C. § 216 to recover overtime compensation allegedly due defend-

ant's employee Dodson. The district court entered judgment for the defendant. We reverse.

Dodson's agreed compensation was $100 per week. He testified that he worked more than 60 hours in many weeks, but there was conflicting testimony. The district court found that he did not work more than 55 hours in any week. Since $1.60 per hour (the statutory minimum) for 40 hours plus $2.40 (time and one half) for 15 hours would equal $100, compensation of $100 for 55 hours work in one week, conceivably could be in compliance with 29 U.S.C. § 207(a).

The district court accepted defendant's testimony that his offer of $100 per week was based on the computations above referred to, and his testimony as to his agreement with Dodson: "I told him I would start him out at $100.00 a week, because I thought he would have sometimes fifty-five hours a week. Now, there would be sometimes that he would not have to work over forty or forty-five or forty-eight, but I would guarantee him I would still give him that $100.00 a week, whether he worked forty hours or whether he worked fifty-five and to stay within the minimum wage law. . . . I told him that was the reason we started him out at $100.00, instead of the original $85.00 a week that I hired him for before we started. . . . I want you to come to work as soon as you can, and I will start you out at $100.00, because we have got to stay within the minimum wage."

We accept, of course, the district court's resolution of the conflicts in testimony. The findings are not clearly erroneous.

We conclude, however, as a matter of law that the conversation found to have taken place between Dodson and defendant did not form a contract which explicitly made $1.60 per hour the "regular rate" for the purposes of 29 U.S.C. § 207 (a)(1). It would be a most strained construction of defendant's testimony that the rates per hour were mentioned in

the conversation between defendant and Dodson and surely the district court did not so find. To be consistent with defendant's theory of the matter, the agreement would have had to include compensation at the rate of $2.40 per hour for all hours in excess of 40, even if the total number of hours exceeded 55 and the total compensation thereby exceeded $100, but there was no mention of that. Moreover in the weeks Dodson's compensation was reduced because he missed entire days, the reduction was in units of 16.67 per day as if the rate per hour was uniform throughout the six-day week.

Where an employee covered by the act works a varying number of hours in a week in return for an agreed weekly wage, the "regular rate" for a particular week is the quotient obtained by dividing the weekly wage by the number of hours worked. It will not be presumed that the agreement for the weekly wage reflected an agreement on proper regular and overtime rates even though the compensation would be in compliance if the statutory minimum rate per hour were assumed to be the agreed regular rate. **Overnight Motor Transport Co. v. Missel,** 316 U.S. 572, 581 (1942).

It has been held in a similar setting that there are two indispensable factors for sustaining the theory applied by the district court: "(1) an explicit understanding between the parties as to the existence of a regular wage rate that is stepped up for overtime hours and (2) a careful practice of recording the hours worked overtime by each employee and paying him for them at the increased rate." **Nunn's Battery & Electric Co. v. Goldberg,** 298 F.2d 516, 520 (5th Cir., 1962). Neither the explicit understanding nor the careful practice of recording was present here. Although we must accept the finding that the hours did not exceed 55 in any week, records properly maintained would have more clearly established the fact, whatever it was. See also **Hodgson v. Elm Hill Meats,** 327 F.Supp. 1009, 1014 (E.D.Ky., 1971), aff'd 463 F.2d 1186 (6th Cir., 1972).

29 U.S.C. § 207(f) authorizes a particular type of contract which specifies a regular rate of pay of not less than the statutory minimum hourly rate, and time and a half for overtime, and provides a weekly guaranty to pay for not more than 60 hours. The latter element is present here, but the first and second are not. It has been held, relying upon administrative construction, that this so-called **Belo** exception does not apply to a case like the present one, where the total hours of the work week, although varying, are in excess of forty. **Foremost Dairies, Inc. v. Wirtz,** 381 F.2d 653, 657 (1967). At least one court has held that under the **Belo** exception an individual contract must be in writing. **Hodgson v. Elm Hill Meats,** 327 F.Supp. 1009, 1014 (E.D.Ky., 1971), aff'd 463 F.2d 1186 (6th Cir., 1972). But even if a writing is not required, the agreement must specify the rates per hour.

Thus, although the district court was satisfied that defendant was intending to comply, defendant failed to make a sufficiently explicit contract to accomplish that intention.

At trial, plaintiff sought recovery of unpaid overtime based on 32 work weeks of 63 hours and one 50-hour week. There was testimony to support that claim, although the district court found that Dodson never worked more than 55 hours in a week. Although there was testimony by defendant indicating that there may have been other weeks in which Dodson worked only 50 hours, the district court made no finding that Dodson worked less than 55 hours in any week. Since there were no records of hours worked in existence at the time of trial, it is unlikely that defendant could show that Dodson worked less than 55 hours in any of the 32 weeks. For these reasons we do not remand for further determination of this issue. On the basis of 32 weeks of 55 hours (the "regular rate" being $1.818 per hour) and one 50-hour week (the "regular rate" being $2.00 per hour) the amount of unpaid overtime is $446.32.

The clerk of this court is directed to enter judgment reversing the judgment appealed from and remanding the cause with instructions to enter judgment for plaintiff for $446.32 and costs.

Knoch, Senior Circuit Judge. (dissenting) I am sorry to find myself in sharp disagreement with my brothers. It seems to me that we are unduly penalizing this employer not only for failing to retain legal counsel to draft an employment contract for him in such specific terms as beyond question would meet the technical requirements of the law, but also for his generosity in dealing loosely and informally with the payments for overtime.

The experienced District Judge who resolved the issues of credibility, in my opinion, deserves better at our hands than that we accept his direct factual findings but reject his, to me, reasonable inferences therefrom. The witness, whom he credited, testified that the employee was hired at $85 per week, but that because of expected overtime which might reach 55 hours, he would be paid $100 "because we have got to stay within the minimum wage."

I cannot agree that it was essential to mention specific hourly rates in this type of informal, oral understanding. It is entirely probable that, apart from improving employee relations by, in effect, guaranteed overtime, the attendant bookkeeping costs for recording each hour and computing pay on that basis were unjustified from a business viewpoint.

I would affirm the decision of the District Judge.

APPENDIX C

Text of Statutes Involved

29 USC 206(a)

§ 206. Minimum wage

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $1.40 an hour during the first year from the effective date of the Fair Labor Standards Amendments of 1966 and not less than $1.60 an hour thereafter, except as otherwise provided in this section:

29 USC 207(a)(1)

207. Maximum hours.—(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 USC 207(f)

(f) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsec-

tion (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 [§ 206(a) or (b) of this title] (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

29 USC 216(c)

(c) The Administrator is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or section 7 of this Act [§§ 206 or 207 of this title], and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. When a written request is filed by any employee with the Administrator claiming unpaid minimum wages or unpaid overtime compensation under section 6 or section 7 of this Act [§§ 206 or 207 of this title], the Administrator may bring an action in any court of competent jurisdiction to recover the amount of such claim: Provided, That this authority to sue shall not be used by the Administrator in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Administrator if it does involve any issue of law not so finally settled. The consent of any employee to the bringing of any such action by the Administrator, unless such action is dismissed without prejudice on motion of the

Administrator, shall constitute a waiver by such employee of any right of action he may have under subsection (b) of this section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. Any sums thus recovered by the Administrator on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Administrator, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Administrator under this subsection for the purposes of the statutes of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947 [§ 255(a) of this title], it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

APPENDIX D

Testimony of Lee Price

* * * * * * *

[207] Q. Do you know the law requires you to pay time and a half for those hours he worked in excess of forty?

A. Yes, I do.

Q. Do you know the law requires you to keep a record of his hourly rate? Have you got such a record for Eddie Dodson?

A. No, because I paid him a weekly rate, based on fifty-five hours a week.

Q. In other words, you don't have an hourly rate posted for him? You never kept time of his hours worked; and you never had posted his time and a half rate; because he never had any? You just paid him $100.00, regardless of the hours worked?

A. I paid him $100.00 a week.

Q. And, if he missed a day, all you would do was divide six into $100.00 and deduct that much?

[96] A. I never did take the first day. I took the second day he missed; never took the first.

Q. You never took the first day?

A. I went ahead and give it to him.

Q. Here is one, "Paid for four days, $83.30." Now, if you divide six into a hundred, you come up with something like $16.70; is that right?

A. That's right.

Q. So, actually, you paid a daily rate of $16.70?

A. No, he was paid weekly.

Q. That is what it says. If he didn't work, if he was going to miss the overtime hours, that would be $2.40 an hour?

[208] A. If he'd have worked his six days or five days he'd have got his $100.00.

No. 73-1115

APR 17 1974
MICHAEL RODAK, JR., CLERK

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B, A-7 to A-11) is not yet reported. The memorandum opinion of the district court (Pet. App. A, A-1 to A-6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1973. The petition for a writ of certiorari was filed on January 17, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in view of petitioner's failure to establish that the wage arrangement with one of his employees met the statutory requirements for the limited overtime exception provided in Section 7(f) of the Fair Labor Standards Act, the court of appeals correctly held that he had violated the Act's overtime provisions by paying the employee in question a flat weekly salary for all hours worked, including those in excess of 40 per week.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*, including its exception for certain guaranteed wage agreements (29 U.S.C. 207(f)), are set forth in the petition (Pet. App. C, A-12 to A-14).

STATEMENT

This action was brought by the Secretary of Labor under Section 16(c) of the Fair Labor Standards Act of 1938, as amended, pursuant to the written request of one employee, Eddie Dodson, to recover unpaid overtime compensation due to him from petitioner. The parties stipulated that the only issues for decision by the trial court were (1) the number of weekly overtime hours worked by Dodson, and (2) a determination of any unpaid overtime compensation due to him for such hours (Pet. App. A, A-1).

It is undisputed that petitioner did not keep, maintain or preserve a record of the hours worked each workday and each workweek by Dodson, as required by the Act, and that such payroll records as he had kept for this employee simply showed that he was paid a weekly

salary of $100 and that it was reduced by one-sixth when Dodson missed a day of work (Pet. App. A, A-5; Pet. App. B, A-9).

Since there were no records by which Dodson's hours of work could be established, the district court found, on the basis of petitioner's testimony, that he worked from 50 to 55 hours per week, but never more than 55 in any given week (Pet. App. A, A-4).

On the second issue, the court held that Dodson was not entitled to any overtime compensation since his weekly salary was sufficient to cover the statutory minimum of $1.60 per hour and time and one-half the minimum for all hours worked overtime up to and including 55 a week. In so holding, the trial court made no reference whatsoever to the limited overtime exception provided in Section 7(f) of the Act for certain wage agreements with employees whose duties "necessitate irregular hours of work."

In reversing, the court of appeals accepted all of the trial court's findings of fact, but held that they were not sufficient, as a matter of law, to establish a "contract which explicitly made $1.60 per hour the 'regular rate' for purposes of 29 U.S.C. §207(a)(1)" (Pet. App. B, A-8). The court referred at length to petitioner's conversation with Dodson in which he told him that "I will start you out at $100.00, because we have got to stay within the minimum wage" (*ibid.*),[1] and noted that "the rates per hour were [not] mentioned in the con-

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[1] According to petitioner, he originally planned to pay Dodson $85 a week, but instead paid him $100, "whether he worked forty hours or whether he worked fifty-five," because he wanted "to stay within the minimum wage law" (Pet. App. B, A-8). If, as petitioner's testimony indicates, it was expected that Dodson

versation * * *," and that "the district court did not so find" (Pet. App. B, A-8 to A-9). Unlike the trial court, the court of appeals examined Section 7(f) of the Act and concluded that the type of contract contemplated by it is one "which specifies a regular rate of pay of not less than the statutory minimum hourly rate, and time and a half for overtime" (Pet. App. B, A-10). As the court noted, neither element was present here. The court of appeals also noted that Section 7(f) or the "so-called *Belo* exception" has been held inapplicable to a case like the present one where the hours of work, although fluctuating, are always in excess of 40 per week (Pet. App. B, A-10).

ARGUMENT

1. Contrary to petitioner's assertion, the decision below does not hold that an oral or informal wage arrangement can never meet the requirements of Section 7(f) of the Act, but rather that the conversation which petitioner had with the employee did not result in an "explicit understanding" concerning a stated hourly rate for regular work. "Implication" as this court noted in *Overnight Motor Co.* v. *Missel*, 316 U.S. 572, "cannot mend a contract so deficient in complying with the law" (316 U.S. at 581).[2]

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would normally work a 55-hour week, $85 would not have yielded him the prescribed minimum hourly rate of $1.60 but only $1.545 an hour ($85 divided by 55). When this fact is borne in mind, the increase in salary—which so impressed the district judge that he accepted petitioner's version of it as "probably correct" (Pet. App. A, A-2)—is easily understood.

[2]It is, of course irrelevant that the employee's salary was sufficient to cover the bare statutory minimum and time and one-half the minimum for a 55-hour workweek. As this court also noted in *Overnight Motor Co., supra*, "[t]he provision of §7(a) requiring this extra pay for overtime is clear and unambiguous. It calls for 150% of the regular, not the minimum, wage" (316 U.S. at 577).

Nor did the court of appeals hold that petitioner's failure to observe the Act's recordkeeping requirements would, standing alone, constitute a basis for the recovery of overtime compensation under the Act, as petitioner asserts (Pet. 8-9). Petitioner's failure to keep records, however, confirms the lack of any explicit understanding concerning a regular hourly rate of pay.

2. In any event, as the opinion below recognizes, it has long been the administrative construction, upheld in *Foremost Dairies, Inc.* v. *Wirtz*, 381 F. 2d 653 (C.A. 5), certiorari denied *sub nom. Home Town Foods, Inc.* v. *Wirtz*, 390 U.S. 946, that the Section 7(f) "exception does not apply to a case like the present one, where the total hours of the work week, although varying, are in excess of forty" (Pet. App. B, A-10). This principle, which independently supports the judgment below, is not challenged in the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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APRIL 1974.